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NOTES

CONDITIONAL SALES — REMEDIES OF THE SELLER. In recent years there has been a constant growth of instalment buying, such that this type of buying has been extended to almost all fields. From ponderous personal property, the field of instalment buying has extended itself to cover even the smallest articles of personal property, such as clothing, rings, radios, etc. The conditional sale contract covers the agreement between the buyer and seller, and around this contract has grown up a new field of law, and one that has become of great importance to both lawyer and layman. It is with this contract, and the remedies of the seller on a conditional sales contract, that this writing is intended to treat.

In 1918 the Commissioners on Uniform State Laws approved the Uniform Conditional Sales Act, which act sets out in brief the law of conditional sales. As yet only nine states have adopted this act, but

its value is being recognized more as time goes by, and it appears that the future will show an adoption of this uniform act by most of the states, just as the Uniform Negotiable Instruments Act has grown to unanimous adoption.

In treating of the remedies of the conditional seller, the first question that arises is the election of remedies. There are two views on this question. These views depend upon whether the states treat the conditional sale device as merely an executory contract or whether they treat it as a security device analogous to a chattel mortgage. In many states the conditional vendor may disaffirm the conditional sale by retaking the property, or affirm it by suing for the balance due. He has his choice of the two, but cannot have both.¹ Yet in other states the seller may retake the property and resell it, and, after applying the proceeds of the sale to the contract price, hold the buyer for any deficiency.²

Just when the conditional seller may retake the property is another question that is treated minutely by the courts. A general rule is that the seller may retake possession of the property from the original buyer at any time after a condition of the contract is broken. This is true regardless of whether or not the contract provided for such retaking upon default.³ Many contracts provide that the seller may retake possession of the property when and if he deems the financial condition of the buyer unsound, but in contracts of this kind, the seller must have reasonable grounds for such belief before he can retake the property.⁴ When the buyer is not in default in performing the conditions of the contract, the seller cannot retake the property.⁵ There are many cases in which the conditional seller waives strict performance of the contract, and then seeks to repossess the property without further notice or ado upon becoming aware of his laxity, yet a restriction is placed upon the seller under circumstances of this nature. Where the conditional seller waives strict performance of the contract as to payment, he must give the buyer reasonable notice that he will repossess the article if payment is not made, and that in the future the contract will be strictly enforced; and failure to give such notice before seizure of the property will constitute the seizure a wrongful rescission of the contract.⁶ Suing the conditional buyer in trover, where the seller retains

¹ *Forgan v. Blythe*, 258 Mich. 689, 242 N. W. 811 (1932); *La Salle Finance Co. v. De Jarnett*, 95 Ind. 468, 181 N. E. 164 (1932), § 24 of Uniform Conditional Sales Act.

² *Interstate Ice & Power Co. v. U. S. Fire Ins. Co.*, 215 App. Div. 768, 213 N. Y. S. 826 (1926).

³ *National Bank of Arkansas v. Interstate Packing Co.*, 175 Ark. 341, 299 S. W. 34 (1927).

⁴ *Rochon v. Pacific Coast Mortgage Co.*, 111 Cal. App. 298, 295 P. 364 (1931).

⁵ *Arter v. Jacobs*, 226 App. Div. 343, 234 N. Y. S. 357 (1929).

⁶ *Paine v. Meier & Frank Co.*, 146 Or. 40, 27 P. 315 (1934).

title to the property, is rescission of the contract,⁷ or exercising the power to retake. The conditional seller who repossesses the property without the consent of the buyer, or without process of law, is liable for conversion.⁸ The seller's right to retake the property has been held not to include the right to use force reasonably necessary to expel the conditional buyer from the automobile.⁹

Where the seller retains title to the property sold until the purchase price is paid, institution of an action for balance of purchase price constituted an election to make the sale absolute and defeats the seller's right to maintain an action of replevin.¹⁰

There are certain conditions which must be performed by the seller before he can repossess the property sold under the conditional sales contract. Where defaults in conditions of the contract are impliedly waived, the seller must give reasonable notice before forfeiture and repossession can be claimed.¹¹ A return of the amounts paid on the purchase price under the contract is not a condition precedent to repossession.¹² Where the contract requires a demand before repossession, such must be made.¹³ A refusal by the conditional buyer to surrender the goods upon the demand of the seller after a default, is a conversion of the goods on the part of the buyer.¹⁴

The buyer has certain defenses which he may use against the seller in actions to recover the property or the price thereof. Some of these are: breach of warranty may be shown as defense in replevin action by seller;¹⁵ fraud in the execution of the contract or damages by breach thereof may be shown;¹⁶ failure of seller to insure property under the contract was held a good defense.¹⁷ In many states the conditional buyer has a certain time within which to regain possession of the goods taken from him by paying the full amount due, including interest, charges and expenses.¹⁸

⁷ *Woodbury v. Atlanta Dental Supply Co.*, 137 S. E. 302, 36 Ga. App. 548 (1927).

⁸ *Rice v. Leisky Furniture Co.*, 167 Tenn. 202, 68 S. W. 2d 107 (1934).

⁹ *Roberts v. Speck*, 169 Wash. 613, 14 P. 2d 33 (1932).

¹⁰ *Daughy v. Laubach*, 172 Okla. 42, 44 P. 2d 105 (1935).

¹¹ *Columbia Airways v. Stevens*, 80 Utah 215, 14 P. 2d 984 (1932).

¹² *Schmoller & Mueller Piano Co. v. Smith*, 204 Iowa 661, 215 N. W. 628 (1927).

¹³ *General Motors Acpt. Corp. v. Hicks*, 189 Ark. 62, 70 S. W. 2d 509 (1934).

¹⁴ *Stimpson Computing Scale Co. v. Gowell*, 261 Mass. 378, 158 N. E. 777 (1927).

¹⁵ *Wayne Tank & Pump Co. v. Harper*, 118 Okla. 274, 247 P. 985 (1926).

¹⁶ *Singer Sewing Machine Co. v. Cole*, 187 Ark. 1017, 63 S. W. 2d 977 (1933).

¹⁷ *Brunswick-Balke-Callender Co. v. Culberson*, 178 Ark. 957, 12 S. W. 2d 903 (1929).

¹⁸ *Thomas G. Jewett, Jr., Inc. v. Keystone Drilling Co.*, 282 Mass. 469, 185 N. E. 369 (1933); *Clark v. Tri-State Discount Co.*, 151 Misc. 679, 271 N. Y. S. 779 (1934).

In suits to replevy the property sold under a conditional sales contract, the seller has the burden of showing the breach of contract and the balance due. The questions of alleged conversion, tender of balance due on defaulted contract, and waiver of redemption period, are all questions of fact which the jury must determine.¹⁹

Several rules are laid out for judging the amount of recovery which will be allowed the seller in suits on the conditional sales contract. A judgment in replevin, where the plaintiff is in possession of the goods, should be for the amount of the debt reduced by amount received on sale of property.²⁰ Measure of value of personal property sold under conditional bill of sale is, without contrary proof, balance due.²¹ In vendor's suit in trover to recover the property sold, unpaid amount due on debt is recoverable as damages.²²

There are many questions which arise in regard to the effect of the seller's repossessing the property, and the rights and duties of the seller under such action. Many cases hold that retaking the property is a rescission of the contract,²³ while others hold that such action does not constitute a rescission of the contract.²⁴ There is the same controversy over the question of the seller's right to recover the price after retaking the property. Some cases hold that repossessing of the chattels sold under a conditional sales contract forfeits the seller's right to recover the purchase price.²⁵ Others hold that this is not inconsistent with an action for the purchase price up to the point of satisfaction.²⁶ Another of these questions is that of the liability of the seller to refund money paid by the buyer after the seller has repossessed the property. Some cases hold that the seller repossessing the property should restore to the buyer the consideration paid, less the depreciation above ordinary wear and tear.²⁷ To the contrary, we find cases holding that where the conditional seller repossesses upon the buyer's default, the buyer is not entitled to a refund of payments made.²⁸

¹⁹ Brunswick-Balke-Callender Co. v. Culberson, 178 Ark. 957, 12 S. W. 2d 903 (1929); Arter v. Jacobs, 226 App. Div. 343, 234 N. Y. S. 357 (1929); Howell v. Thew Shovel Co., 184 Ark. 777, 43 S. W. 2d 366 (1931); Kipp Supply Co. v. Richfield Oil Co. of Cal., 117 Cal. App. 47, 3 P. 2d 333 (1931); Smith v. Oliver Motor Co., 174 S. C. 464, 177 S. E. 174 (1935).

²⁰ Trice v. People's Loan & Investment Co., 173 Ark. 1160, 293 S. W. 1037 (1927).

²¹ Commercial Investment Trust v. Miles, 181 Ark. 77, 25 S. W. 2d 3 (1930); McCarty v. Cook, 189 Ark. 309, 71 S. W. 2d 1053 (1934).

²² Wheeler v. Lovett, 35 Ga. App. 325, 132 S. E. 921 (1926).

²³ Jones v. Williams, 40 Ga. App. 819, 151 S. E. 695 (1930).

²⁴ Interstate Ice & Power Co. v. U. S. Fire Ins. Co., 215 App. Div. 768, 213 N. Y. S. 826 (1926).

²⁵ Perkins v. Skates, 220 Ala. 216, 154 So. 514 (1929); Randall v. Chaney, 84 Ind. App. 280, 151 N. E. 105 (1926).

²⁶ Mercier v. Nashua Brick Co., 84 N. H. 59, 146 A. 165 (1929).

²⁷ Tifton Chevrolet Co. v. Mathis, 44 Ga. App. 839, 163 S. E. 308 (1932).

²⁸ Livingstone v. Havens, 191 Minn. 623, 255 N. W. 120 (1934).

The last problem to be treated in this discussion of the remedies of the seller is that of resale, and the obligation of the seller to resell and dispose of the proceeds of the resale. Section 20 of the Uniform Conditional Sales Act provides that if the buyer has not paid at least fifty per cent of the purchase price at the time of retaking, the seller shall not be under a duty to resell the goods, unless the buyer serves upon the seller within ten days of the retaking of the goods, a written notice to sell. If the buyer has paid at least fifty per cent of the purchase price, the seller, according to Section 20 of the same act, after the lapse of the ten day redemption period, must resell the goods at public auction within thirty days after the retaking. Section 21 provides that the proceeds of the resale are to go to paying of expenses and the balance due. If there is a deficiency after the resale, the buyer will be held for the deficiency, as stated in Section 22. Any remaining sum shall be paid to the buyer. Section 24 states that no bringing of action on the part of the seller shall be inconsistent with his later retaking the goods. Section 25 provides that failure of the seller to resell the goods where the buyer has paid over fifty per cent or demanded a resale, will make the seller liable in damages to the buyer, such damages not to be less than one-fourth of the payments made by the buyer. Thus it is seen that the Uniform Conditional Sales Act provides amply for the rights and duties of the parties on resale of the goods. The propositions set out in this Act are well stated in a New York case wherein the court held that where substantial portions of the purchase price have been paid prior to default and repossession by seller, under conditional sale, the seller should protect the buyer's equity in the property which is not forfeited by default, by resale of the property and applying proceeds therefrom to the unpaid portion of the purchase price. If the proceeds of the resale exceed the deficiency, the excess goes to the buyer; if they do not exceed the deficiency, the buyer is liable for such deficiency. The case also held that the conditional buyer must be given reasonable notice of the time and place of the sale. Also, the seller must exercise ordinary diligence in getting the best resale price on the goods.²⁹

Thus has been covered the field of the remedies of the seller on a conditional sales contract, and the rights and duties he has under such contract. While the law on this subject is not completely in accord in all the jurisdictions, the trend seems to be towards adopting the rules set out in the Uniform Conditional Sales Act, which rules are based on good sense and sound law.

Lawrence J. Petroskius.

²⁹ General Motors Acctpt. Corp. v. Dickinson, 249 Ky. 422, 60 S. W. 2d 967 (1933).

INDIANA GROSS INCOME TAX — EXEMPTION OF INTERSTATE COMMERCE.— In order to broaden the Indiana tax laws, thereby increasing the state's revenue and, at the same time, to relieve property of some of the burden of maintaining government, there was passed, The Gross Income Tax of 1933.¹ This law sought to tax the gross income derived from trades, businesses or commerce.

Under the commerce clause² of the United States Constitution, Congress is given power to regulate commerce with foreign nations and among the several States. In recognition of this delegated power, The Gross Income Act provides that,³ "There shall be excepted from the gross income taxable under this act: (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this State and foreign countries, but only to the extent to which the state of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America."

The above exception would seem to imply that to a certain extent the state of Indiana may levy a tax on gross income received in interstate commerce. To examine how far a state may go in burdening interstate commerce with a gross income tax is the purpose of this writing.

In *Indiana Creosoting Company v. McNutt*,⁴ the appellant sought to avoid a tax on gross income by alleging that his business was interstate commerce, and therefore exempt from the act. The appellant was an Indiana corporation engaged in the business of creosoting. The plant for such business was located in Bloomington, Indiana, but the company's home office was located in Louisville, Kentucky. Appellant had contracted with the Chicago, Indianapolis and Louisville Railway Company to creosote three million railroad ties. By the terms of the contract the railroad company agreed to deliver the ties at the appellant's Bloomington plant, and after the creosoting process to accept redelivery at the same place.

The appellant contended that the contract was negotiated in the state of Illinois, and since payment for said contract would be made at the home office in Louisville, the company should be exempt from the payment of a tax on gross income.

The court held that appellant's business was intrastate and not interstate, and thus not exempt. The court said, "It is stated in argument of appellant that the contract was negotiated in Illinois, and consummated in Kentucky. There is a total lack of evidence to sub-

¹ BURNS ANN. ST. 1933, § 64-2601.

² Article 1, § 8 of the U. S. Const.

³ BURNS ANN. ST. 1933, § 64-2606.

⁴ 210 Ind. 656, 5 N. E. 2d 310 (1936).

stantiate this statement, but, even if it were true, this fact of itself would not constitute interstate commerce." Thus the mere fact that a contract was negotiated in one state and consummated in another would not make it the subject of interstate commerce if the contract was carried out completely within the state of Indiana.

The above rule is supported in *Ware & Leland v. Mobile County*⁵ wherein the court said, ". . . contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade."

Again in the case of *Western Live Stock v. Bureau of Revenue*,⁶ the court held that, "The mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance of the contract is within its protection. . . ."

In the very interesting case of *Storen v. J. D. Adams Mfg. Co.*,⁷ the appellee was an Indiana corporation engaged in the manufacture of machinery for the repair and construction of roads. The Adams Company was entirely located within the state of Indiana; its home office, single manufacturing plant, and principal place of business were all in Indiana. However, the appellee's receipts from business in other states and foreign countries, during each of the four years immediately preceding the trial, amounted to eighty per-cent (80%) of its entire gross income. One of the questions involved, and the question that we are primarily interested in, was whether or not that portion of the appellee's income derived from interstate and foreign commerce was taxable under the gross income tax.

The Indiana Supreme Court held that, "This clause excepts such gross income only to the extent that taxation is forbidden by the Constitution, and the act must be construed as contemplating a tax on all income that the state is permitted to tax. Courts will not prevent the carrying out of a legislative intention unless the Constitution clearly forbids. . . . Any tax upon one engaged in interstate commerce is a burden upon interstate commerce, but all taxes are not illegal burdens.

⁵ 209 U. S. 405, 411, 28 S. Ct. 526, 52 L. Ed. 855 (1908). Accord: *Pennsylvania R. Co. v. Clark Bros. Coal Mining Co.*, 238 U. S. 456, 35 S. Ct. 896, 899, 59 L. Ed. 1407 (1915); *Superior Oil Co. v. State of Mississippi*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504 (1930).

⁶ 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1938). Comment: Dongus, 13 IND. L. JOUR. 500 (1938).

⁷ 212 Ind. 343, 7 N. E. 2d 941 (1937), *Fleck, Indiana Gross Income Tax*, 13 IND. L. JOUR. 178 (1937).

It is only where the tax laid upon interstate commerce as such, or in such a manner as to discriminate against interstate commerce, that it is to be condemned. Those engaged in interstate commerce are not exempt from taxation by the states, and any tax that does no more than impose upon them or their property a reasonable share of the burdens of government will not be condemned."

The court further pointed out that decisions⁸ sustain the right of states to levy excise⁹ taxes on interstate and foreign commerce. "... while the cases refer to a fair share of the regular property taxes, they must be construed as establishing the rule that a statute will not be condemned if in effect it burdens those engaged in interstate commerce only to the extent of their just share of governmental burdens under any reasonable method of general taxation."

Thus the Indiana court held the appellee's gross income received in interstate and foreign commerce was taxable under the gross income act. Interstate commerce must bear a fair and equal burden along with other state business.

The United States Supreme Court reversed,¹⁰ the above decision on appeal in *J. D. Adams Mfg. Co. v. Storen*.¹¹ The court held that taxing the appellant's business in interstate commerce was a violation of article 1, section 8 of the United States Constitution. "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce, and that the exaction is of such character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which interstate commerce is not exposed and which the commerce clause forbids.¹² We have repeatedly held¹³ that such a tax is a regulation of, and burden upon, interstate commerce prohibited by article 1, section 8 of the Constitution."

⁸ *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 462, 39 S. Ct. 522 (1919); *Clark v. Titusville*, 184 U. S. 329, 22 S. Ct. 382 (1902).

⁹ *Miles v. Dept. of Treasury*, 209 Ind. 172, 199 N. E. 372 (1935), held Gross Income Tax of 1933 to be constitutional, and called it an "excise tax" for the privilege of domicile. In *J. D. Adams v. Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429 (1938) the court held that the Indiana Gross Income Tax was not an excise tax for the privilege of domicile alone, but rather a tax on gross receipts from commerce.

¹⁰ Reversed in part and affirmed in part.

¹¹ 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429 (1938). Mr. Justice Black dissents in part.

¹² *Op. cit. supra* n. 2.

¹³ *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878); *Fargo v. Michigan*, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888 (1887); *Philadelphia & So. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (1887); *Galveston, etc. Ry. Co. v. Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. Ed. 1031 (1908); *The Minnesota Rate Cases*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed.

The United States Supreme Court previously held in *Western Live Stock v. Bureau of Revenue*¹⁴ that, "The vice which renders local taxes measured by gross receipts from interstate commerce unconstitutional is that they place on interstate commerce burdens of such a nature as to be capable in point of substance of being imposed or added to with equal right by every state which the commerce touches, so that without protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In the *J. D. Adams* decision, the federal court cites other cases that are in point with its reasoning. As in *Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington*,¹⁵ the court held that, "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce . . . business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

Also in *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessment of New Jersey*,¹⁶ the court held that a levy on gross income was unlawful wherein the state attempted to tax lines or mains of the telephone company located within the state of New Jersey at a ratio in proportion to the whole length of their line.

And in *Fisher's Blend Station, Inc. v. Tax Commission of State of Washington*,¹⁷ the court held that a state occupation tax levied on a commercial radio broadcasting station was unconstitutional where measured by the company's gross receipts. Such a tax constituted a burden on interstate commerce.

However, in *Postal Telegraph-Cable Co. v. Richmond*,¹⁸ the court said, "If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way — in this case for its right of way and the expense to others incident to the use of it."

And again returning to the *Western Live Stock* case,¹⁹ we find the court saying, "It was not the purpose of the commerce clause to re-

1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 (1913); *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295 (1917); *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748 (1918).

¹⁴ *Op. cit. supra* n. 6.

¹⁵ 302 U. S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937).

¹⁶ 280 U. S. 338, 50 S. Ct. 111, 74 L. Ed. 463 (1930).

¹⁷ 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956 (1936).

¹⁸ 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. Ed. 590 (1919).

¹⁹ *Op. cit. supra* n. 6. Accord: *Coverdale v. Ark.-La. Pipe Line Co.*, 303 U. S. 604, 58 S. Ct. 736 (1938).

lieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.”

In the recent case, *Department of Treasury of Indiana v. South Bend Tribune*,²⁰ the Indiana Supreme Court held that when a newspaper had one-eighth of its circulation outside the state of Indiana, the entire gross income derived from the paper's advertising contracts was subject to the gross income tax.

The court strongly relied upon the *Western Live Stock* case, and held that income from advertising contracts was not such gross income as could be taxed by any other state. And that therefore the state of Indiana was not prohibited from taxing such gross income.

The appellee has not, as yet, appealed to a federal court, but, under the *Western Live Stock* rule,²¹ it is very doubtful that the Indiana decision would be reversed.

In concluding, the United States Supreme Court has consistently refused to allow state gross income taxes to burden interstate commerce. The nature of the gross income tax is such that it would cause interstate commerce to bear cumulative burdens that the commerce clause forbids. But the court has held taxes on net income not to be an unconstitutional burden on interstate commerce.²² And it has also held that when a state tax only remotely affects interstate commerce, it will not be held invalid.²³

Therefore, since the Indiana Gross Income Tax would place a direct burden upon interstate commerce, and would subject such commerce to the risk of double taxation, it follows that gross income received in interstate and foreign commerce must be regarded as exempt from operation of the Indiana law.

Perhaps it may seem a bit unfair that gross income derived from interstate commerce should be exempt from bearing what would seem to be a “reasonable burden” of its share in state taxation. But, on the other hand, the many difficulties that would arise from the multiple taxation of interstate commerce makes it apparent that the United States Supreme Court has been very practical in holding that a gross income tax levied on interstate commerce is an unconstitutional burden on that commerce.

Robert K. Rodibaugh.

²⁰ 24 N. E. 2d 275 (Ind., 1939).

²¹ *Op. cit. supra* n. 14.

²² *Diefendorf v. Gallet*, 51 Idaho 619, 10 Pac. 2d 307 (1932); *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918).

²³ *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084 (1919).

RADIO — LEGAL EFFECT OF ITS USE IN POLICE WORK.—One of the outstanding developments of modern mechanical aids to crime prevention has been the adaptation of the radio to police work. But with this development has come added problems and questions, not the least of which is the legality of arrests and searches where the act has not taken place in the officer's presence, and he is justifying his actions on information received on the police radio.

It has been said that the law of arrest is antiquated as compared with the modern methods used by police departments in dealing with criminals, and this has been attributed to the fact that the law of arrest has undergone practically no revision since its formulation in England in the seventeenth and eighteenth centuries. Policemen in their efforts to protect society have found the limits of the law too binding, and it was estimated by the officials of the Interstate Commission on Crime that seventy-five percent of all arrests were illegal in some particular.¹ The use of the police radio and squad car has not decreased and probably has increased this percentage.

An arrest is the taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law.² That a private individual can arrest under certain circumstances and that an officer can always arrest under a properly executed warrant is outside the scope of this note. The statutes and decisions of some states permit an officer to make an arrest without a warrant for a misdemeanor amounting to a breach of the peace,³ while in other states he may arrest without a warrant for any misdemeanor committed in his presence.⁴ Illinois has gone further and allows an officer to arrest without a warrant when a misdemeanor has in fact been committed and he has reasonable cause to believe that the person to be arrested committed it.⁵ In all states, the officer may arrest without the warrant where the felony is committed in his presence, and in most states may arrest where he has reason to believe that a felony has been committed and that the person arrested committed it, though in fact no felony was committed.⁶

¹ Warner, *Investigating the Law of Arrest*, 26 AM. BAR ASS'N. J. 151 (1940).

² RESTATEMENT OF TORTS, § 112 (1934). For a more succinct definition, see THE A. L. I., CODE CRIM. PROC., § 18 (1930) reading "Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense."

³ THE A. L. I., CODE CRIM. PROC., § 21 (1930), citing *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536 (1898); NORTH CAROLINA CONSOL. STAT., § 4549 (1919); TEXAS REV. CR. STAT., Cr. Pr. § 212 (1925).

⁴ *Ibid.*, citing thirty-six states, including: INDIANA BURNS STAT., § 2176 (1296); NEBRASKA COMP. STAT., § 9961 (1922); OHIO PAGE'S GEN. CODE, § 13492 (1926).

⁵ ILLINOIS REV. STAT., c. 38, § 657 (1939).

⁶ THE A. L. I., CODE CRIM. PROC., § 21 (1930) and citations.

In a Wisconsin case,⁷ the police department of Milwaukee was informed by telephone that an assault with intent to rob had been committed in a nearby suburb by a group of five men, who used a Hudson automobile bearing a given license number. The informant also gave a description of one of the men which fitted the defendant. This information was broadcast by the department and picked up by two police officers. Later that night these officers found a Hudson automobile with the given license plate at a soft drink parlor in Milwaukee. Defendant was found seated with four other men in a booth. The officers arrested the men for assault with intent to rob. The Supreme Court of Wisconsin upheld the arrest, holding that "As the reported assault and robbery constituted a felony, it was within the authority of Officers McGarvey and Flannery to arrest the defendants on that charge without a warrant, if on the facts which had been communicated to and broadcast by the police department, and the coinciding facts discovered by them upon finding the Hudson automobile with the described license number, and also finding the described man in the group of five men assembled in the booth, they had probable cause to believe or to suspect that the defendants had participated in the commission of that felony." This decision recognizes the reason for the arrest without a warrant, namely, "because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without a warrant."⁸

The Supreme Court of Tennessee has upheld the arrest for commission of a felony when radio information has aided the arresting officers.⁹ A radio broadcast informed Chattanooga police officers that two men were concealing themselves on the Sears-Roebuck building. The officers surrounded the building, secured a ladder, placed it upon an adjoining building, and upon reaching the roof first observed two suitcases, then discovered the defendants crouched down in a hiding position on one corner of the roof. The defendants were placed under arrest. Upon a search they were found to possess a full set of burglar's tools. They were convicted of the statutory offense of carrying burglarious instruments. The court said that under the circumstances the officers were fully justified in believing that a felony was about to be committed.

In the two cases discussed above, the parties apprehended were later convicted, but in recent Illinois case,¹⁰ the parties arrested were not the perpetrators of the crime for which they were arrested. Illinois State police officers received a radio call informing them that a robbery

⁷ *Scaffido v. State*, 215 Wis. 389, 254 N. W. 651 (1934).

⁸ *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. Rep. 280, 69 L. Ed. 543, 39 A. L. R. 790 (1925).

⁹ *Trousdale v. State*, 76 S. W. 2d 646 (Tenn., 1934).

¹⁰ *People v. Euctice*, 371 Ill. 159, 20 N. E. 2d 159 (1939).

had been committed in Indiana; that an Indiana police officer had been killed; and that the killers were proceeding along a certain highway into Illinois. They were also given a description of the men and instructed to go to a point on this highway and to stop and search all cars. The officers had stopped about one hundred cars but had waved on all but fifteen or twenty before the defendants approached. Defendants were riding in the rear seat, and as the car stopped, one of the defendants was seen to drop a pistol which had been held between his legs, to the floor of the car. Another pistol was lying on the floor and the other defendant attempted to kick it under the rear seat. One officer testified that when the men were stopped, he noticed that one defendant answered the description of one of the men given him in the radio call, and it was his belief that these men had participated in the robbery and shooting in Indiana. Actually they were innocent of that crime. The court said the officer might arrest where he had a reasonable ground for believing that the person to be arrested was implicated in the crime. "His belief must be such as would influence the conduct of a prudent and cautious man under the circumstances."

If the legality of the arrest is not put in issue by the defendant, the prosecutor must be careful in his use of police radio information as evidence. A Texas court in *Barber v. State*¹¹ granted the defendant a new trial, declaring that testimony of an officer that he was called over the radio that there were two men stripping a car was in the nature of hearsay evidence.

Incidental to the right to arrest is the right of search and seizure. The right without a search warrant to search the person of one lawfully arrested, and to seize articles found on him or in his custody, such as weapons, evidences of the crime charged, etc., is well established.¹² The arrests in the Scaffido case¹³ and in the Euctice case¹⁴ which were discussed above having been justified, the incidental search was necessary as well for the purpose of safety of custody, to ascertain the presence of weapons or implements of escape, as for purposes of discovering evidence of the crime charged.

¹¹ 78 S. W. 2d 183 (Texas, 1935).

¹² *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. Rep. 341, 58 L. Ed. 625, L. R. A. 1915B 834 (1914); *People v. Chaigles*, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 677 (1923); *Gisske v. Landers*, 9 Cal. App. 13, 98 P. 43 (1908); *State v. Magnano*, 97 Conn. 543, 117 A. 550 (1922); *North v. People*, 139 Ill. 81, 28 N. E. 966 (1891); *People v. Swift*, 319 Ill. 359, 150 N. E. 263 (1926); *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438 (1890); *Haverstick v. State*, 196 Ind. 145, 147 N. E. 625 (1925); *Hubbard v. Garner*, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580 (1897); *Decker v. State*, 113 Ohio St. 512, 150 N. E. 74, 42 A. L. R. 1151 (1925).

¹³ *Scaffido v. State*, 215 Wis. 389, 254 N. W. 651 (1934).

¹⁴ *People v. Euctice*, 371 Ill. 159, 20 N. E. 2d 159 (1939).